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Supreme Court, U.S.
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No. 99-6218

In The

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the retroactive application of a judicial abolishment of the substantive rule of criminal law known as the "year-and-a-day rule" to an assault committed five years prior to that abolishment violates the Fourteenth Amendment of the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

A. Procedural History 2

B. Statement of Facts 4

SUMMARY OF THE ARGUMENT 4

ARGUMENT 7

1. The year-and-a-day rule is a substantive rule of law 7

2. General ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature 8

3. The purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree 11

4. The abolishment of the year-and-a-day rule was unexpected and indefensible by reference to the law which had been expressed at the time of Petitioner's conduct 18

A. Introduction 18

B. General principles 19

TABLE OF CONTENTS – Continued

Page

C. At the time of Petitioner's acts the year-and-a-day rule was recognized as a viable part of Tennessee law 20

D. The omission of a specific reference to the year-and-a-day rule in the Tennessee Criminal Code of 1989 would not give a reasonable person sufficient constitutional notice that the year-and-a-day rule was in question in Tennessee 21

E. The erroneous ruling by the intermediate appellate court that the year-and-a-day rule had been abolished was rendered after Petitioner's act and could not suffice to put a reasonable person on notice that prior precedent would be reversed 25

F. In light of the Tennessee Supreme Court's specific approval of the year-and-a-day rule in 1907, it was improper to look to the law of other jurisdictions to place that ruling in doubt 28

5. The majority of jurisdictions that have considered the present issue have determined that retroactive judicial abrogation of the year-and-a-day rule would violate Due Process 30

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES:

Ball v. United States, 140 U.S. 118 (1891) 7

Beazell v. Ohio, 269 U.S. 167 (1925) 10

Bouie v. City of Columbia, 378 U.S. 347 (1964) .... *passim*

Calder v. Bull, 3 Dall. 386 (1798) 9, 10, 11

Carmell v. Texas, ___ U.S. ___, 120 S.Ct. 1620, 1627 (2000) 9, 13, 14

Cole v. State, 512 S.W.2d 598 (Tenn. Crim. App. 1974) 3, 7, 20, 21, 30

Collins v. Youngblood, 497 U.S. 37 (1990) 9, 10

Commonwealth v. Ladd, 166 A.2d 501 (Pa. 1960) ... 34, 35

Commonwealth v. Lewis, 409 N.E.2d 771 (Mass. 1980) 34

Devine v. New Mexico Dep't of Corrections, 866 F.2d 339 (10th Cir. 1989) 21

Frank v. Magnum, 237 U.S. 309 (1915) 11

Hopt v. Territory of Utah, 110 U.S. 574 (1884) 9

Johnson v. State, 472 A.2d 1311 (Del. 1983) 19

Kaiser Aluminum v. Bonjorno, 494 U.S. 827 (1990) 13

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 14

Lopez v. McCotter, 875 F.2d 273 (10th Cir. 1989) 29

Louisville, Evansville, & St. Louis R.R. Co. v. Clarke, 152 U.S. 230 (1894) 20

Marks v. United States, 430 U.S. 188 (1977) ... 11, 12, 16, 21

Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985) 19, 29

TABLE OF AUTHORITIES – Continued

Page

People v. Farley, 53 Cal. Rptr. 2d 702 (Cal. Ct. App. 1996) 21

People v. Snipe, 192 Cal. Rptr. 6 (Cal. Ct. App. 1972) 34, 35

People v. Stevenson, 331 N.W.2d 143 (Mich. 1982) 10, 15, 31, 32

Percer v. State, 103 S.W. 780 (Tenn. 1907) ..... *passim*

Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. 1988) 16

State v. Alford, 970 S.W.2d 944 (Tenn. 1998) 23

State v. Alley, 594 S.W.2d 381 (Tenn. 1980) 20

State v. Cooper, 113 S.W. 1048 (Tenn. 1908) 23

State v. Gabehart, 836 P.2d 102 (N.M. 1992) 10, 34

State v. Minster, 302 Md. 240, 486 A.2d 1197 (1985) 30

State v. Pine, 524 A.2d 1104 (R.I. 1987) 10, 31

State v. Rogers, 992 S.W.2d 393 (Tenn. 1999) ..... *passim*

State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995) 3, 25, 26

State v. Sandridge, 365 N.E.2d 898 (Ohio Ct. C. P. 1977) 34, 35

State v. Vance, 403 S.E.2d 495 (N.C. 1991) 11, 30

State v. Watkins, 130 S.W. 839 (Tenn. 1910) 23

State v. Young, 390 A.2d 556 (N.J. 1978) .. 10, 15, 33, 34

United States v. Anderson, 356 F.Supp. 445 (D.C. Del. 1973) 20

TABLE OF AUTHORITIES – Continued

Page

United States v. Chase, 18 F.3d 1166 (4th Cir. 1994) 7

United States v. Jackson, 528 A.2d 1211 (D.C. App. 1987) 34

United States v. Texas, 507 U.S. 529 (1993) 23

Weaver v. Graham, 450 U.S. 24 (1981) 8, 14, 19

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. XIV § 1 ..... 1, 5, 11, 16

U.S. CONST. art. I, § 10 ..... 2, 4, 8, 11

STATUTES:

28 U.S.C. § 1257 1

TENN. CODE ANN. § 39-11-101(2) (1997) 22

TENN. CODE ANN. § 39-11-102 (1997) 24

TENN. CODE ANN. § 39-11-102(a) (1997) 22

TENN. CODE ANN. § 39-11-104 (1997) 24

TENN. CODE ANN. § 39-13-201 (1997) 22

TENN. CODE ANN. § 39-11-203(e)(2) (1997) 3

MISCELLANEOUS:

Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960) 18, 27, 28

Homicide – Time Between Injury and Death, 60 ALR3d 1223 (1974) 30

14 TENN. JURIS., *Homicide*, § 4 (1984) 21

West's TENNESSEE DIGEST 2d, Vol. 17, *Homicide* § 6 (1986) 21

WHARTON ON HOMICIDE (3d ed.) 8

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee (JA, 11-21) is reported at *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The opinion of the Tennessee Court of Criminal Appeals (JA, 7-9) is unreported.

JURISDICTION

The opinion of the Supreme Court of Tennessee was entered on May 24, 1999. The Supreme Court of Tennessee denied a Petition to Rehear on June 21, 1999. The petition for a writ of certiorari was filed on September 16, 1999, and was granted on May 22, 2000. Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner submits that this case involves application of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Due Process Clause is contained in Section 1 of the Fourteenth Amendment and provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves Article I, Section 10 of the United States Constitution, which provides that:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

STATEMENT OF THE CASE

A. Procedural History

On August 9, 1994, Petitioner Wilbert K. Rogers was indicted by the Shelby County (Tennessee) Grand Jury and charged with the May 7, 1994 attempted first degree murder of James Bowdery. (JA, 2-3). The victim died in August 1995, more than a year-and-a-day after the assault. (R. Vol. II, 3, 138-139, 142). Thereafter, on September 12, 1995, a new indictment was returned against Petitioner charging him with first degree murder. (JA, 4-5; R. Vol. I, 1-13). The Shelby County Public Defender was appointed to represent Petitioner who was found guilty of second degree murder by a petit jury on January 31, 1996. He was sentenced to thirty-three years imprisonment. (JA, 6; R. Vol. I, 34).

On appeal to the Tennessee Court of Criminal Appeals, Petitioner argued that he could not be convicted of murder because of the common law year-and-a-day rule enunciated by the Tennessee Supreme Court in *Percer v. State*, 103 S.W. 780, 782 (1907), and cited as authority by the Tennessee Court of Criminal Appeals in *Cole v. State*, 512 S.W.2d 598, 601 (Tenn. Crim. App. 1974). Petitioner contended that, at most, he could be convicted of attempted second degree murder which carries a determinative sentence with a range of eight to thirty years imprisonment.

In an opinion filed on October 17, 1997, the Tennessee Court of Criminal Appeals rejected Petitioner's appeal, holding that the state legislature abolished the year-and-a-day rule by its failure to specifically include it as a defense in the 1989 codification of the criminal code. (JA, 9). As authority, the Court of Criminal Appeals cited TENN. CODE ANN. § 39-11-203(e)(2) which specifically abolished all common law defenses and its prior opinion, *State v. Ruane*, 912 S.W.2d 766 (Tenn. Crim. App. 1995), which was decided *after* the assault on Mr. Bowdery. In *Ruane*, the Court of Criminal Appeals characterized the year-and-a-day rule as a common-law defense and found that all common-law defenses had been abolished by the Tennessee Criminal Sentencing Reform Act of 1989. *Id.* at 774.

The Tennessee Supreme Court granted Petitioner's Application for Permission to Appeal and on May 24, 1999 issued its opinion as *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The Tennessee Supreme Court rejected the notion that the year-and-a-day rule was a criminal defense reasoning that "[w]hile similar in some respects to a defense in the sense that it precludes a conviction, the year-and-a-day rule is even more powerful than a

defense because it entirely precludes a murder prosecution." *Id.* at 400. (JA, 23). It found that the year-and-a-day rule had not been abolished by the codification of the Tennessee Criminal Code and thus was in full force and effect when Bowdery was assaulted. *Id.* (JA, 24). However, it found that the common law year-and-a-day rule was no longer justified and judicially abolished the rule.

The Tennessee Supreme Court concluded that its 1999 abrogation of the rule could be retroactively applied to the 1994 assault without violating the Fourteenth Amendment of the United States Constitution because its decision was "not an unexpected and unforseen judicial construction of a principle of criminal law." *Id.* at 402. (JA, 27-28).

On June 21, 1999, the Tennessee Supreme Court denied a Petition to Rehear. (JA, 31). A petition for writ of certiorari was filed on September 16, 1999 and was granted, along with a motion to proceed in forma pauperis, on May 22, 2000.

B. Statement of Facts

This case is purely a question of law. There is no factual dispute that the victim was stabbed on May 6, 1994 and died in August 1995. *Id.* at 395. (JA, 13).

SUMMARY OF THE ARGUMENT

Although the Ex Post Facto Clause contained in Article I, § 10 applies only to restrict the actions of state legislatures, this Court has held that general ex post facto

principles are applicable to judicial rulings through the Due Process Clause of the Fourteenth Amendment. More specifically, this Court has held that the Due Process Clause of the Fourteenth Amendment bars retroactive application of judicial rulings in criminal cases that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *See Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964), and *Marks v. United States*, 430 U.S. 188, 191-192 (1977).

Three issues must be addressed to determine whether the decision of the Tennessee Supreme Court is contrary to due process. First, whether general ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature. Second, whether any such prohibition applies to the Tennessee Supreme Court through the Due Process Clause. Third, whether the decision of the Tennessee Supreme Court to abolish the year-and-a-day rule was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

Petitioner submits that basic ex post facto principles clearly prohibit the Tennessee legislature from retroactively eliminating the year-and-a-day rule, that the purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree, and finally that the Tennessee Supreme Court's decision to abolish the rule was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

The decision of the Tennessee Supreme Court to overrule its own precedent and judicially abolish the year-and-a-day rule was so unexpected and indefensible with respect to the law that had been expressed in Tennessee that it relied upon two extremes to justify its conclusion that the ruling was not unexpected and indefensible. First, the Court justified the ruling by looking to the law of other states, reasoning that abolition of the rule in other states would put a defendant on notice that the rule was in question in Tennessee. Under this theory, Tennessee citizens could not rely upon the rulings of the Tennessee Supreme Court as stating the status of the law in Tennessee, but must be cognizant of the law in all fifty states. The mere fact that the Tennessee Supreme Court had to look to the law of other states demonstrates that the law in Tennessee did not render its opinion expected and defensible.

Second, after the Tennessee Supreme Court rejected all prosecution arguments that the Tennessee Criminal Code of 1989 had actually eliminated the year-and-a-day rule as a substantive requirement, the Court, nevertheless, justified its conclusion that its rejection of the rule was foreseeable by asserting that the very same Criminal Code had put the viability of the rule in question. The implied reasoning of the Court must be that, although properly interpreted the Criminal Code did not affect the year-and-a-day rule, the Criminal Code could have theoretically[1] been misinterpreted as affecting the rule, thus,

[1] The word "theoretically" is used because no court had actually misinterpreted the Criminal Code when the acts were committed in the present case.

causing its continued viability to be in question. It is submitted that the Tennessee Supreme Court's reliance upon a theoretically possible misinterpretation of the Tennessee Criminal Code further demonstrates that the law, correctly interpreted, did not render its decision expected and defensible.

In sum, the law in Tennessee was such that the opinion of the Tennessee Supreme Court was constitutionally unexpected and indefensible based on the law that had been expressed in Tennessee. Accordingly, the retroactive application of the decision to abolish the year-and-a-day rule to Petitioner's case violated the Fourteenth Amendment.

ARGUMENT

1. The year-and-a-day rule is a substantive rule of law.

On May 7, 1994, the date James Bowdery was stabbed, the common law year-and-a-day rule was in full force and effect in Tennessee. *See Percer v. State*, 103 S.W. 780 (Tenn. 1907); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974); *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). As conceded by the State of Tennessee in the Tennessee Supreme Court,[2] the year-and-a-day rule was a substantive principle of Tennessee law.[3] In *Percer v. State*, *supra*, at

[2] *See State v. Rogers*, 992 S.W.2d 393, 399 (Tenn. 1999).

[3] *See also United States v. Chase*, 18 F.3d 1166 (4th Cir. 1994) (finding the common law rule to be a substantive rule of law). *Chase* relied heavily upon *Ball v. United States*, 140 U.S. 118

782, the Tennessee Supreme Court, quoted with approval WHARTON ON HOMICIDE (3d ed.), p. 18, which said of the common law rule: "In murder, the death must be proven to have taken place within a year and a day from the date of the injury received." In *State v. Rogers, supra,* at 396, the Tennessee Supreme Court cited this same quote for the proposition that it had recognized "the viability of the rule in Tennessee" since 1907. Thus, as interpreted by the Tennessee Supreme Court, the common law year-and-a-day rule dealt with an essential element of the proof which the prosecution was required to prove.

2. General ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature.

Article I, § 10 of the United States Constitution forbids the passage of an ex post facto law by any state. Two elements must be present for a criminal law to be ex post facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham,* 450 U.S. 24, 29 (1981). An ex post facto law within the meaning of the federal constitution has been defined as:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done; criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d.

(1891) ("The controlling *element* which distinguished the guilt of the assailant from a common assault was the death within a year and a day.") (emphasis added).

> Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798), cited in *Carmell v. Texas,* ___ U.S. ___, 120 S.Ct. 1620, 1627 (2000).

Petitioner submits that all four types of ex post facto laws described in *Calder* would have been involved if the Tennessee Legislature had passed a law in 1999 amending the Tennessee Criminal Code to eliminate the year-and-a-day rule as a requirement of homicide and that law had been applied retrospectively to Petitioner's case.

The first category has been broadly interpreted by this Court to include situations where a legislature changes or eliminates an element or ingredient of an offense.[4] Under the Ex Post Facto Clause states "may not retroactively alter the definition of crimes," *Collins v. Youngblood,* 497 U.S. 37, 43 (1990), nor may they "change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Territory of Utah,* 110 U.S.

[4] *See Carmell v. Texas,* 120 S.Ct. 1620, 1631 (2000) (the fact that the statute did not change the elements of the offense simply demonstrates that it did not fit within the first category); *see also id.* at 1632-33 (comparing the fourth category with something as unfair as "retrospectively eliminating an element of the offense"); *id.* at 1651 (Ginsburg, J., dissenting) (the fact that "[l]egislatures may not retroactively alter the definition of crimes" noted as an example of the first category, but not the fourth).

574, 589-590 (1884). An ex post facto law has also been defined as a law "which deprives one charged with a crime of any defense available according to law at the time when the act was committed." *Collins*, 497 U.S. 37, 42 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925)). Hence, the retrospective application of a new statute eliminating the year-and-a-day rule to Petitioner's case would have violated the first *Calder* category, as it has been interpreted by this Court.

The second *Calder* category would also have been involved in that elimination of the rule five years after the assault would have aggravated the offense and made it greater than it was when committed and greater than it was when the year had expired. After the year-and-a-day passed without the death of the victim, an act of the legislature to retrospectively eliminate the rule would have aggravated the offense from a lesser offense to a homicide. *Cf. State v. Gabehart*, 836 P.2d 102, 105 (N.M. 1992); *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987); *State v. Young*, 390 A.2d 556 (N.J. 1978) (all three cases found that retroactive judicial abolishment of year-and-a-day rule would aggravate the offense).

A legislative act retroactively eliminating the rule would also have been a retroactive increase in punishment from that which was authorized at the expiration of the year-and-a-day for assault to that which would be authorized for homicide. *Cf. People v. Stevenson*, 331 N.W.2d 143, 148 (Mich. 1982) (finding court's retroactive abolishment of year-and-a-day rule would increase the authorized penalty).

Finally, such legislation would also involve the fourth *Calder* category. Eliminating the need for the prosecution to prove that the death occurred within a year-and-a-day would lessen the proof required to be presented by the prosecution. *Cf. State v. Vance*, 403 S.E.2d 495, 501 (N.C. 1991) (retroactively eliminating year-and-a-day rule would permit conviction of defendant on "less evidence").

Without question, if the Tennessee Legislature had passed legislation abolishing the year-and-a-day rule after Petitioner's act, any application of the new law to his case would have violated the Ex Post Facto Clause of the United States Constitution.

3. The purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree.

The Ex Post Facto Clause contained in Article I, § 10 of the United States Constitution is a limitation on the power of state legislatures and does not of its own force apply to judicial rulings. *Marks v. United States*, 430 U.S. 188 (1977); *Frank v. Magnum*, 237 U.S. 309 (1915). Nevertheless, this Court has held that general ex post facto principles are applicable to judicial rulings through the Due Process Clause of the Fourteenth Amendment. More specifically, this Court has held that the Due Process Clause of the Fourteenth Amendment bars retroactive application of judicial rulings in criminal cases that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."

See Bouie v. City of Columbia, 378 U.S. 347, 353-354 (1964), and *Marks v. United States*, 430 U.S. 188, 191-192 (1977). This Court reasoned that if a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State's highest court is also barred by the Due Process Clause from achieving precisely the same result by judicial decree. *Bouie*, 378 U.S. at 353-354. The Court stated that: "The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." *Id.* at 354 (citation omitted). In evaluating whether the retroactive application of a judicial decree violates Due Process, a critical question is whether the Constitution would prohibit the same result attained by the exercise of the state's legislative power. *Id.* at 355. Under authority of *Bouie*, Due Process prevents the Tennessee Supreme Court from retroactively applying its abrogation of the year-and-a-day rule to Petitioner's case if it was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Id.* at 353-354.

In addition to relying on the specific authority of *Bouie*, Petitioner contends that the purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree.

The principal interests that the Ex Post Facto Clause is designed to serve include (a) fundamental fairness, (b) the notion that citizens be given fair warning of the law, and (c) the prevention of arbitrary and vindictive laws.

See Carmell v. Texas, ___ U.S. ___, 120 S.Ct. 1620, 1631-33, 1650 (2000).

This Court has recognized that fundamental fairness issues apply to all four *Calder* categories:

> All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life. *Carmell*, 120 S.Ct. at 1633.

Ex post facto laws violate notions of fundamental fairness because they "are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man." *Id.*[5] Furthermore, ex post facto laws violate notions of fundamental fairness even when there is no notice or reliance interests involved. *Id.* at 1631-32 n. 16.

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[5] *See also, Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J. concurring) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. . . . Justice Story said that 'retrospective laws are . . . generally unjust. . . . The presumption of nonretroactivity, in short, gives effect to enduring notions of what is fair.").

With regard to fair warning, this Court has not confined the concept to simply warning of those acts which are deemed criminal. *See Weaver v. Graham*, 450 U.S. 24 (1980) (statute reducing good-time credit for offense committed before its effective date violated ex post facto). "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf v. USI Film Products*, 511 U.S. 244, 282, n. 35 (1994) (citing *Weaver v. Graham*, 450 U.S. at 28-30). Accordingly, this Court has concluded that legislative enactments must do more than give fair warning of what conduct is criminal, they must give "fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Carmell*, 120 S.Ct. at 1632, n.21.

Ex post facto principles prevent legislatures from arbitrarily and vindictively singling out individuals for criminal sanctions in response to news that they have committed a serious act of offensive behavior. In such cases, political pressure from voters or constituents may cause legislators to wish to punish offensive behavior that otherwise would escape punishment or would receive a lesser punishment based on existing statutes. The prohibition against ex post facto laws minimizes the possibility that legislators may use the criminal law to target identifiable individuals based on their prior conduct.

Each of the three purposes that the Ex Post Facto Clause is designed to serve, i.e., fundamental justice, fair warning, and the prevention of arbitrary and vindictive laws, are implicated in the present case. The Tennessee

Supreme Court waited until it had a live defendant in front of it in 1999 to determine what law would govern the defendant's 1994 act. By announcing a change in substantive law, rather than interpreting existing law, the Tennessee Supreme Court's decision below raises the very concerns for arbitrariness and vindictiveness that animate the ex post facto limitation on legislative power. *Cf. People v. Stevenson*, 331 N.W.2d 143, 148-149 (Mich. 1982). It was fundamentally unfair to eliminate the requirement that the prosecution prove the death of the victim within a year-and-a-day of the assault and retroactively apply its ruling to an assault that had occurred five years earlier. When the year expired and the victim was still alive, the State was barred from ever establishing a homicide if the victim died in the future. This was the law in effect when the assault occurred and when the year had passed without the victim's death. To abolish the rule five years later would be "fundamentally unjust" and "fundamentally unfair in a jurisdiction devoted to the rule of law." *State v. Young*, 390 A.2d 556, 560 (N.J. 1978). Likewise, although Petitioner was on notice that his conduct was criminal at the time of the act, he was entitled to rely upon the applicability of the year-and-a-day rule to bar a homicide prosecution if the victim did not die within the required period. *Cf. People v. Stevenson*, 331 N.W.2d 143, 148 (Mich. 1982). Furthermore, reliance on the rule would be naturally heightened after the victim slipped into a coma and Petitioner was charged with attempted murder, and even further heightened when the year passed without the victim's death.

The principles on which the Ex Post Facto Clause is based, i.e., fundamental justice, fair warning, and the prevention of arbitrary and vindictive laws, are core concepts of constitutional liberty. *Cf. Marks v. United States*, 430 U.S. 188, 191 (1977) (principle of fair warning is fundamental to concept of constitutional liberty); *Rubino v. Lynaugh*, 845 F.2d 1266, 1273 (5th Cir. 1988) ("ban on ex post facto legislative or judicial action does more than ensure fair warning; it also curbs vindictiveness"). As such, the Due Process Clause of the Fourteenth Amendment prevents courts from applying judicial rulings in ways which impinge upon these same principles. Where ex post facto laws are by their nature fundamentally unfair when enacted by a legislature, they are likewise "fundamentally unfair" as the result of judicial rulings. Whether the governmental actor responsible for the unfair law is a legislature or a court is irrelevant. The same can be said for the prevention of arbitrary and vindictive laws. State supreme courts which are politically accountable to the electorate may be susceptible to the same kind of influences which justify the ex post facto limitations placed on legislatures.

The law applicable to evaluating challenges under the Ex Post Facto Clause is equally applicable to a determination of whether retroactive application of a judicial decree violates the Due Process Clause.[6] This is especially

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[6] As will be discussed more fully in the next section, this Court held in *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." The notion that court decisions may be applied retroactively without violating Due Process is premised on the idea that if a court decision is expected and defensible by reference to law which has been expressed prior to the conduct in issue, the purpose of fair warning is not implicated and the likelihood that the ruling is the result of vindictive and arbitrary action is lessened. On the other hand, if the ruling is unexpected and indefensible by reference to the law, the defendant has been denied fair warning and the likelihood that the ruling is arbitrary and vindictive is increased.

true when a court is not "interpreting" the law, but is, in fact, engaged in the process of judicial "legislation." As early as 1907, the Tennessee Supreme Court recognized the year-and-a-day rule as a substantive requirement of Tennessee law. *See Percer v. State*, 103 S.W. 780 (Tenn. 1907). In Petitioner's case the Tennessee Supreme Court recognized that this rule "has in fact never been a part of the statutory law of [Tennessee]" and that the existence of the rule was unaffected by the Tennessee Criminal Code of 1989. *State v. Rogers*, 992 S.W.2d 393, 400 (Tenn. 1999). Hence, when the Tennessee Supreme Court "abolished" the rule, *id.* at 401, it did so not upon the interpretation or construction of a statutory provision. Nor was the rule abolished based upon the interpretation or construction of prior judicial opinion. Prior judicial precedent clearly recognized the year-and-a-day rule in Tennessee. Rather, the Tennessee Supreme Court abolished the rule merely because of its determination that the reasons originally supporting it no longer existed. *Id.*

Accordingly, when the Tennessee Supreme Court "abolished" the existing substantive rule of law which required the prosecution to establish the death of the

victim within a year-and-a-day of the assault, it assumed a legislative capacity.

Existing statutory and case law did not support the abolishment of the substantive rule of law. Hence, the Court was not "interpreting" or "construing" existing law, but was acting as a legislative body. Petitioner submits that the Due Process Clause prevents a court acting in a legislative capacity from accomplishing what legislatures are prohibited from doing under the Ex Post Facto Clause. *Bouie*, 378 U.S. at 353-354.

4. The abolishment of the year-and-a-day rule was unexpected and indefensible by reference to the law which had been expressed at the time of Petitioner's conduct.

A. Introduction

In *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (citing Hall, General Principles Of Criminal Law (2d ed. 1960) at 61), this Court held that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."

In the present case, the Tennessee Supreme Court recognized the general prohibition against retroactive application of judicial decisions. However, it reasoned that retroactive application of the decision to abrogate the rule did not violate Due Process because it was not an unexpected and unforseen judicial construction. It stated:

> Given the fact that the rule has been abolished by every court [referring to other states] which has squarely faced the issue, and given the fact that the validity of the rule has been questioned in this State in light of the passage of the 1989 Act, we conclude that our decision abrogating the rule is not an unexpected and unforeseen judicial construction of a principle of criminal law.

Rogers, 992 S.W.2d at 402.

The Tennessee Supreme Court erred by applying its decision retroactively as the abrogation of the year-and-a-day rule was unexpected and indefensible by reference to the law expressed before Petitioner's acts.

B. General principles

Whether the decision of the Tennessee Supreme Court to overturn prior precedent and abolish the rule was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" is a question of federal law subject to this Court's independent determination. *Cf. Moore v. Wyrick*, 766 F.2d 1253, 1255 (8th Cir. 1985); *Weaver v. Graham*, 450 U.S. 24, 33 (1981) (ex post facto law claim is one of federal law).

The proper standard or frame of reference used to determine whether the Tennessee Supreme Court's ruling was unexpected and indefensible is that of a person of ordinary intelligence. *Bouie*, 378 U.S. at 351; *Johnson v. State*, 472 A.2d 1311, 1316 (Del. 1983) (common intelligence). To apply such a standard a legal fiction is employed whereby a person of ordinary intelligence is

under a duty to ascertain the state law, including established rules of judicial construction, which might be applicable to his or her conduct. *United States v. Anderson*, 356 F.Supp. 445 (D.C. Del. 1973). The subjective expectation of a particular defendant is irrelevant. *Bouie*, 378 U.S. at 355 n. 5.

C. At the time of Petitioner's acts the year-and-a-day rule was recognized as a viable part of Tennessee law.

As the Tennessee Supreme Court recognized in the present case, the year-and-a-day rule is deeply rooted in the common law. As early as 1894, this Court held that common law murder undoubtedly included the year-and-a-day rule and that "such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute." *Louisville, Evansville, & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230, 239 (1894). Tennessee is a common law state which, in its Constitution of 1796, adopted the common law of England as it stood in 1776. Further, that common law prevails in Tennessee unless and until specifically changed by statute. *See State v. Alley*, 594 S.W.2d 381, 382 (Tenn. 1980). As such, the year-and-a-day rule would have been part of the body of Tennessee common law even if the Tennessee Supreme Court had remained mute concerning the rule. Instead, it specifically recognized its existence in *Percer v. State*, 103 S.W. 780 (Tenn. 1907), as did the Tennessee Court of Criminal Appeals in *Cole v. State*, 512

S.W.2d 598 (Tenn. Crim. App. 1974).[7] Further, no Tennessee decision had ever called the year-and-a-day rule into question until after Petitioner's act. The citizens of a state should be able to rely upon the last opinion of its highest court and the overruling of long established precedent, while always "possible," is unforeseeable for due process purposes. *See Devine v. New Mexico Dep't of Corrections*, 866 F.2d 339, 345 (10th Cir. 1989) (citing *Marks v. United States*, 430 U.S. 188, 192-196 (1977)); *People v. Farley*, 53 Cal. Rptr. 2d 702, 710 (1996) ("whether existing judicial precedent will be overruled is a matter of speculation and conjecture").

D. The omission of a specific reference to the year-and-a-day rule in the Tennessee Criminal Code of 1989 would not give a reasonable person sufficient constitutional notice that the year-and-a-day rule was in question in Tennessee.

In the Tennessee Supreme Court, the prosecution abandoned its contention that the year-and-a-day rule was a defense, but argued that the rule had been abrogated because it was not included in the definition of criminal homicide found in the Tennessee Criminal Code of 1989. The 1989 Code defined criminal homicide as "the unlawful killing of another person which may be first

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[7] Both cases are cited in West's TENNESSEE DIGEST 2d, Vol. 17, *Homicide* § 6 (1986). Likewise, the year-and-a-day rule is mentioned in 14 TENN. JURIS., *Homicide*, § 4, p. 171 n.1 (1984), citing *Cole v. State*, 512 S.W. 2d 598 (Tenn. Crim. App. 1974). The rule was not an obscure point of law, but a well recognized principle of homicide law.

degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide." TENN. CODE ANN. § 39-13-201. The State reasoned that the rule had been abolished by the failure of the legislature to specifically include it in the statutory definition of homicide.

To support its argument, the State cited provisions of the Criminal Code which expressed the desire of the Tennessee legislature to replace all common law offenses with statutory offenses, *see* TENN. CODE ANN. § 39-11-102(a), and its stated objective to "give fair warning of what conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and culpable mental state which together constitute the offense." TENN. CODE ANN. § 39-11-101(2). Petitioner submits that these additional provisions of the Criminal Code bear no relationship to the year-and-a-day rule as it is not a "common law offense" and has no bearing upon either the actus reus or mens rea of a criminal offense.

The Tennessee Supreme Court rejected the State's argument and concluded that the year-and-a-day rule was unaffected by its omission from the 1989 Criminal Code. *Rogers*, 992 S.W.2d at 400. Nevertheless, the State will, in all likelihood, argue in this Court that the failure to include the rule in the 1989 codification was sufficient constitutional notice that the viability of the year-and-a-day rule was in question in Tennessee. Petitioner submits that the mere omission of a specific reference to the common law rule in the 1989 Criminal Code cannot constitute sufficient constitutional notice that the rule was in question.

As noted in the preceding subsection, the rule was a part of the common law of Tennessee. Further, it was specifically recognized as a requirement of the law by the Tennessee Supreme Court in 1907. *Percer v. State*, 103 S.W. 780 (Tenn. 1907). Although long acknowledged as a rule of law, it has never been codified in any Tennessee statute or code. The lack of specific reference to the rule in the 1989 Criminal Code simply continued long-standing Tennessee tradition before and after 1989. Thus, its omission in the Criminal Code could not give notice of the argued problematic viability of the rule.

In addition, it is a general rule of statutory construction that statutes do not alter the common law further than the act expressly declares or than must necessarily be implied from the fact that the act covers the whole subject matter. *State v. Cooper*, 113 S.W. 1048 (Tenn. 1908); *State v. Watkins*, 130 S.W. 839 (Tenn. 1910). *See also United States v. Texas*, 507 U.S. 529 (1993) (presumption that common law principles of law are retained except when a statutory purpose to the contrary is evident; in order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law). The 1989 Criminal Code, like all codes before it, contained no provision relating to the year-and-a-day rule. As such, the 1989 Criminal Code could not have reasonably been interpreted as altering the common law rule.

Another rule of statutory construction provides that criminal statutes are to be strictly construed against the State and in favor of a defendant. *State v. Alford*, 970 S.W.2d 944, 947 (Tenn. 1998).

Unlike many criminal codes, the 1989 Criminal Code specifically included provisions approving common law judicial decisions and interpretive rules. The 1989 Code provides that:

> The provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code.

TENN. CODE ANN. § 39-11-104.

The Sentencing Commission Comments to TENN. CODE ANN. § 39-11-102 further clarified the legislative intent: "While this revised criminal code supersedes common law offenses, the commission does not intend to abrogate the interpretive rules developed under common law and specifically includes such interpretations under § 39-11-104."

The 1989 Criminal Code omitted any provision in the definition of homicide relating to "causation." Hence, a citizen examining the Code would be left with only two choices – that causation had been eliminated as an element of the offense because it was not found in the codification or that the causation element was governed by the common law rule. The State has conceded the more reasonable interpretation that the common law prevails on the element of causation absent a specific reference in the 1989 Criminal Code.

Based on all of these considerations, the Tennessee Supreme Court rejected the State's contention that the failure to specifically include the common law rule in the

statutory definition of homicide resulted in its abolishment. No reasonable Tennessean would be put on notice that the 1989 codification sans a specific reference to the year-and-a-day rule brought its continued viability into question given: (a) that the rule has never been contained in any criminal code, (b) applicable rules of statutory construction do not support such interpretation, (c) the 1989 Criminal Code's specific reference to and adoption of common law interpretations, and (d) the illogical reasoning necessary to interpret the 1989 Code as having eliminated all common law principles, such as causation.

E. The erroneous ruling by the intermediate appellate court that the year-and-a-day rule had been abolished was rendered after Petitioner's act and could not suffice to put a reasonable person on notice that prior precedent would be reversed.

In reviewing Petitioner's case, the Tennessee Supreme Court rejected any notion that the year-and-a-day rule was affected by the 1989 Criminal Code. However, the Tennessee Supreme Court did conclude that an erroneous opinion of the intermediate appellate court, rendered after Petitioner's assault of Bowdery and which stated, *in dicta*, that the rule had been abolished for a different reason, *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995), was evidence of "uncertainty surrounding the continuing viability of the rule in light of the passage of the 1989 Act." *Rogers*, 922 S.W.2d at 402.

Significantly, the intermediate appellate court did not find that the rule was in question due to an omission of a specific reference to the rule. Rather, it determined that

the year-and-a-day rule was a "defense" and that the rule had been abolished under the 1989 Code which did away with all common law defenses. *Ruane*, 912 S.W.2d at 774. In the present case, the Tennessee Supreme Court rejected the reasoning of the intermediate appellate court and determined that the year-and-a-day rule was not a "defense," but something more. *Rogers*, 992 S.W.2d at 400. (JA, 23). However, the Tennessee Supreme Court cited the erroneous *Ruane* decision as evidence of uncertainty as to the continued viability of the rule and as justification for the retroactive application of its ruling. *Id.* at 402. (JA, 27-28). The problem with the analysis of the Tennessee Supreme Court is threefold.

First, the opinion of the intermediate appellate court in *State v. Ruane* was rendered on July 14, 1995, more than one year after the act committed in the present case. Petitioner could not logically be put on constitutionally adequate notice of a potential change in the law by an erroneous opinion rendered after his act in the present case.

Second, as of the date of Petitioner's act, his anticipation of a subsequent reversal of the year-and-a-day rule based on the 1989 Criminal Code would require that he either (a) foresee the future erroneous ruling of the intermediate court *and* misinterpret the law by wrongly determining that the rule was nothing more than a defense, or (b) wrongly conclude that the Code's failure to specifically mention the rule had resulted in its abrogation. The Tennessee Supreme Court found as a matter of law that the year-and-a-day rule is not a defense and that the 1989 Criminal Code did not affect the status of the rule in Tennessee. Accordingly, only a misinterpretation of the

existing law would have put one on notice that the 1989 codification might result in a potential reversal of the rule. The 1989 Criminal Code did not, in fact, have any effect on the common law year-and-a-day rule. Petitioner was deemed to know this law and should have been able to rely upon the law as it was, rather than as it could have been misinterpreted.

Such erroneous interpretations of the law are not reasonable. The notion of the year-and-a-day rule as a defense finds no support in the general common law or the common law as expressed in *Percer v. State*. It was always deemed a substantive element of the offense. Likewise, as discussed in the previous subsection, no reasonable person could interpret the failure to specifically refer to the rule in the 1989 Code as an abrogation of the rule.

Third, the Tennessee Supreme Court misjudged the focus of the *Bouie* test. Under *Bouie* the test is whether the overruling of the prior precedent of the Tennessee Supreme Court and its judicial abolishment of the year-and-a-day rule was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 354 (citing Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960, at 61)). The test is not whether a misinterpretation of the 1989 Criminal Code might render the viability of the rule in question. At the time of Petitioner's act a clear ruling of the Tennessee Supreme Court recognized the viability of the year-and-a-day rule and a correct interpretation of the 1989 Criminal Code would not support a rejection, abolition or modification of the rule. As such, the overruling of the prior precedent of the Tennessee Supreme Court

and its judicial abrogation of the rule was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

F. In light of the Tennessee Supreme Court's specific approval of the year-and-a-day rule in 1907, it was improper to look to the law of other jurisdictions to place that ruling in doubt.

The Tennessee Supreme Court misapprehended the rule of *Bouie* by finding that it could look to the law of other jurisdictions to determine whether its abrogation of the year-and-a-day rule was "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue."

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the defendants' trespass convictions were affirmed by the South Carolina Supreme Court based upon its retroactive application of an interpretation of a trespass statute to include the act of remaining after receiving notice to leave the premises. The pertinent statute made it a criminal offense to *enter* another's premises after receiving notice that entry was prohibited. Quoting Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960, at 61), this Court stated, "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie* at 378 U.S. 354. In determining whether the state court's construction of the criminal statute was so unforeseeable as to deprive the defendant of fair warning, this Court focused primarily on the prior decisional law of South Carolina. Looking

at such prior law, this Court concluded that the new interpretation of the statute to include remaining on premises "has not the slightest support in prior South Carolina decisions." *Id.* at 356. Accordingly, the Court concluded that the pre-existing South Carolina law gave the defendants no warning of the judicial construction of the statute.

With regard to whether the law of other states could be consulted this Court said: "It would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." *Id.* at 359-360. Petitioner submits that decisions from another state cannot give a defendant notice that an unequivocal ruling from his own State's highest court is in question. *See, e.g., Moore v. Wyrick*, 766 F.2d 1253, 1258 (8th Cir. 1985) ("[I]n light of prior unquestioned Missouri authority directly on point, it cannot reasonably be argued that cases from other jurisdictions supply the fair warning that is constitutionally required by the due process clause.); *Bouie*, 378 U.S. at 359-60, 84 S.Ct. at 1705-06."); *Lopez v. McCotter*, 875 F.2d 273, 277-78 (10th Cir. 1989) (the decisional precedents of other states could not have afforded defendant fair warning).

The *Bouie* test focuses upon prior judicial decisions of the state of defendant's offense, not other states. Petitioner submits that Tennessee citizens are not duty-bound to know the law in all fifty states.[8] Thus, a change in the

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[8] A reasonabie citizen searching the law would find a significant number of jurisdictions continue to follow the year-

law of another state cannot provide the foundation of "fair warning" to a Tennessee citizen as to the substance of Tennessee law.

A consideration of prior Tennessee decisions clearly established the year-and-a-day rule as Tennessee law. *Percer v. State*, 103 S.W. 780 (Tenn. 1907); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974). As of the date of Petitioner's act, no Tennessee decision had ever called the year-and-a-day rule into question. The lack of specific reference to the rule in the Tennessee Criminal Code of 1989, like all prior Tennessee codes, had no effect upon the rule's viability as ultimately held by the Tennessee Supreme Court in Petitioner's case. As such, Tennessee law as it "had been expressed prior to the conduct in issue" offers neither the slightest support for abrogation of the year-and-a-day rule nor the required "fair warning" to Petitioner that the rule was under question at the time of his offense.

5. The majority of jurisdictions that have considered the present issue have determined that retroactive judicial abrogation of the year-and-a-day rule would violate Due Process.

In *State v. Vance*, 403 S.E.2d 495, 501 (N.C. 1991), the North Carolina Supreme Court, citing *Bouie*, refused to apply its decision to abrogate the common law year-and-a-day rule retroactively finding that it would permit the

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and-a-day rule. *Homicide – Time Between Injury and Death*, 60 ALR3d 1223 (1974); *State v. Minster*, 302 Md. 240, 486 A.2d 1197, 1200, n.5 (1985).

conviction of the defendant upon "less evidence" than would have been required at the time the victim died.

In *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987), the Rhode Island Supreme Court, citing *Bouie*, declined to retroactively apply its decision to do away with the common law year-and-a-day rule. The Court reasoned that retroactive application of the rule "would 'aggravate' the crime of assault and battery, making it greater than it was when committed or greater than it could have been before the expiration of the year and a day."

In *People v. Stevenson*, 331 N.W.2d 143, 148 (Mich. 1982), the Michigan Supreme Court, citing *Bouie*, refused to retroactively apply its decision to abolish the common law year-and-a-day rule. In reaching its decision, the Court, among other things, rejected prosecution arguments that the defendant had fair notice that his conduct was criminal and that the defendant did not actually rely upon the year-and-a-day rule at the time of the assault. In addressing the prosecution's fair notice argument, the Court first noted that fair notice is not the sole purpose of the Ex Post Facto Clause. It also protects against retroactive increases in punishment. The Court stated:

> A murderer has fair notice that his conduct is criminal, yet this Court would not approve a retroactive increase in the authorized punishment. . . . In this case, abolishing the rule retroactively would permit a possible increase in the maximum authorized punishment from life (assault with intent to rob while armed) to mandatory life without the possibility of parole (first-degree murder). Increasing the authorized penalty after the fact does not deny the defendant fair notice of what conduct is criminal, yet

> it still violates the rule against ex post facto criminal laws. Abrogating the year and a day rule in this case would apply this opinion to events occurring before it and would clearly disadvantage the defendant unfairly.

Stevenson, 331 N.W.2d at 148.

The Court also rejected the prosecution argument that the Constitution only prohibited criminalizing an act which was legal when done. The *Stevenson* Court said:

> The prosecutor's view that the Ex Post Facto Clause only prohibits making illegal what was legal when done is far too narrow. Under the prosecutor's analysis, the Legislature or this Court could retroactively redefine murder to include those cases in which the victim was critically injured, but fully recovered. The retroactive elimination of the requirement that the victim actually die would be justified by the rationale that the defendant did not lack fair warning that his conduct was illegal.

Id. at 149.

In dispatching the "actual reliance" argument of the prosecution, the Court said:

> Arguably, the defendant could have relied on the year and a day rule, not in expecting that the victim would survive that long, but reasonably expecting that if the victim did in fact survive that long, a murder conviction could not result. However, actual reliance or even fictional reliance is not the sole interest protected by due process. The ex post facto principle also protects against erratic or arbitrary action improper in a lawgiver. It would be nothing if not erratic to declare for the first time today, almost five years after the year and a day rule effectively barred a murder prosecution in this case, that such a prosecution could be maintained. The defendant's subjective intent or reliance is simply not controlling in this case. A defendant may not even be aware of various important evidentiary rules or the maximum punishment at the time of the offense, and yet such protections may not be abolished retroactively. *Id.* at 148-149 (citations omitted).

In *State v. Young*, 390 A.2d 556 (N.J. 1978), the New Jersey Supreme Court, citing *Bouie*, also refused to give retroactive effect to its decision to abolish the common law year-and-a-day rule finding that to do so would be "fundamentally unjust" and "fundamentally unfair in a jurisdiction devoted to the rule of law." *Id.* at 560. The Court noted that the *Bouie* reasoning applied, despite defendant's criminal conduct, because *Bouie* indicated that its principles applied when a judicial decision aggravates a crime, or makes it greater than it was when committed. *Id.* (citing *Bouie*, 378 U.S. at 353-354). The New Jersey Supreme Court also rejected the prosecution argument that there had been no actual reliance upon the rule by the defendant at the time of the assault:

> Actual reliance by a defendant on the preexisting state of the criminal law is not a prerequisite to invocation of the principle under consideration. While foreseeability of consequences and fair warning to the public are sometimes considered part of the philosophical basis for the Ex post facto and related due process principles, those principles are operative entirely without regard to whether the defendant in the particular case actually relied on the prior state of the

criminal law at the time of the conduct in question. *Young*, 390 A.2d at 560-561 (citation omitted).

In *United States v. Jackson*, 528 A.2d 1211 (D.C. App. 1987), the District of Columbia Court of Appeals, also citing *Bouie*, refused to retroactively apply its judicial abolition of the common law year-and-a-day rule. Although not viewing the situation as falling within the fair notice or increased punishment categories, the Court reasoned that abrogation of the rule would deprive the defendant "of a substantial right, or more accurately of a plea that would bar prosecution, which was available to him at the time" he assaulted the victim. *Id.* at 1223-1224.

In *Commonwealth v. Lewis*, 409 N.E.2d 771 (Mass. 1980), the Supreme Judicial Court of Massachusetts, also citing *Bouie*, refused to retroactively apply its decision to reject the common law year-and-a-day rule.

In *State v. Gabehart*, 836 P.2d 102, 105 (N.M. 1992), the Supreme Court of New Mexico refused to retroactively apply its decision to abrogate the common law year-and-a-day rule. The Court reasoned that to do so would aggravate a crime from a lesser offense to a homicide.

The Tennessee Supreme Court cited authorities from three other states as supporting the decision to apply its abrogation of the year-and-a-day rule retroactively. *People v. Snipe*, 192 Cal. Rptr. 6 (Ca. Ct. App. 1972); *Commonwealth v. Ladd*, 166 A.2d 501 (Pa. 1960), and *State v. Sandridge*, 365 N.E.2d 898 (Ohio Ct. C.P. 1977). Petitioner submits that these three authorities pale in comparison to those cited above which found such retroactive application to violate ex post facto and due process concerns.

Significantly, *Ladd* predated *Bouie* and both the *Snipe* and *Ladd* decisions involve jurisdictions where the year-and-a-day rule was considered nothing more than a rule of evidence rather than a substantive rule of law.[9] The State conceded in the present case that the Tennessee rule is a substantive rule of law. Additionally, in *Snipe* the legislature changed the year-and-a-day rule before the year had expired. The *Snipe* Court placed great weight upon the fact that the law changed before the right to the rule had vested. Finally, *Sandridge* involves only a trial court opinion in which ex post facto concerns were not considered nor mentioned.

Thus, all jurisdictions which consider the year-and-a-day rule as a substantive rule of law and which have considered whether judicial abrogation of the common law year-and-a-day rule could be applied retroactively have concluded that the constitutional principles enunciated in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), prevent retroactive application of the change in the law.

CONCLUSION

The opinion and judgment of the Supreme Court of Tennessee should be reversed. Retroactive application of the judicial abolishment of the year-and-a-day rule to Petitioner violates the Fourteenth Amendment of the United States Constitution. Accordingly, this case should

[9] The *Snipe* and *Ladd* Courts obviously labored under the misconception that all rules of evidence could be changed without violating Ex Post Facto and Due Process principles.

be remanded to the Supreme Court of Tennessee for a determination as to whether Petitioner's sentence may be modified to a lesser offense or whether a new trial is required.

Respectfully submitted,

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